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IN THE

Supreme Court of the United States

October Term, 1968

No. 50

HANOVER INSURANCE COMPANY OF NEW YORK,

Appellant,

v.

CARL S. VICTOR,

Appellee.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR REHEARING

FLORINDO M. DEROSA
DUNCAN C. LEE
FRANK A. CELENTANO
Counsel for Appellant
Post Office Address
102 Maiden Lane
New York, N. Y. 10005

PETER J. MALLOY, JR.
102 Maiden Lane
New York, N. Y. 10005
Of Counsel

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Appellant presents its petition for a rehearing of the above entitled cause and, in support thereof, respectfully shows:

GROUNDS FOR REHEARING

1. Additional Factors Exist Which Were Not Presented in the Jurisdictional Statement and Which Demonstrate the Existence of a Substantial Federal Question.

From the *Per Curiam* decision of October 14, 1968 it cannot be determined if the Court's dismissal was based on a conclusion that the case in its present status was not yet ripe for consideration. If this was the basis, two factors not previously presented are important.

1. The plaintiff on September 30, 1967 commenced a suit *in personam* in Baltimore City Court, Baltimore, Maryland against appellant's insured, Lyon Associates, Inc., on the

same cause of action with which the subject New York action is concerned. Therefore, the problems posed in appellant's Jurisdictional Statement and Supplemental Brief are real, not hypothetical.

2. On June 2, 1967 Justice Charles Marks entered the following order in a special proceeding under New York CPLR 6214(d) to compel Hanover to pay the proceeds of the automobile liability policy to the Sheriff of the City of New York:

> "ORDERED, that the petition is granted to extent herein indicated, and it is further
>
> ORDERED, that the petition be and the same hereby is granted to the extent that the levy made upon the insurance policy is continued until 10 days after the entry of judgment in the matter entitled Carl S. Victor v. Lyon Associates Inc. and George W. Drysdale, and it is further
>
> ORDERED, ADJUDGED, AND DECREED, that within ten days after service of a copy of the said judgment with notice of entry thereof, respondent is directed to turn over the proceeds of the insurance policy to the Sheriff of the City of New York; and it is further
>
> ORDERED, that the petition be and the same hereby is in other respects denied."

An appeal from this order was heard concurrently with the subject case by the New York Court of Appeals and was dismissed. If the attachment on appeal here is valid, therefore, this order is final. Under the *Simpson* v. *Loehmann* decisions, 21 N.Y.2d 305 and 21 N.Y.2d 990, the "proceeds of the policy" is its "face value", which is presumably the limit of liability of $20,000. The net result is that all state court modes of review have been exhausted and the amount at

stake has been determined. Unless the defendant-insured and appellant take the risk of defaulting, there is no way that they can test the validity of their constitutional arguments. It would be inequitable to require a default as a prerequisite to full review of the case by this Court.

The existence of two suits by Victor on the same cause of action is a reality here. In an ordinary situation where both suits are *in personam,* the insurer's contractual rights are not involved. A trial and judgment in one action will be *res judicata* in the other so that the really onerous defense cost of trial only need be borne once by the insurer. Here, however, various trial judges and commentators[1] have concluded that the second *Simpson* decision eliminates the risk to the insured of a personal judgment if he defends in New York on the merits. If this conclusion is correct, then regardless of the outcome in New York, the judgment, being *in rem* only, cannot be used to estop a second trial on the merits in Baltimore. The insurer, therefore, is forced to provide two full and complete defenses to the same cause of action. Thus, New York under the guise of attachment has changed the duty of the insurer under the policy to defend. As written, the policy only requires the insurer to defend "... any suit *against* the insured ..." The *in rem* action in New York, however, is not against the insured. If the conclusion with respect to the second *Simpson* decision is correct, the suit is against the insured's interest in the policy and the insured is not personally before the Court.[2] This change by New York of the contractual duty

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[1] See, e.g., *Jarvik* v. *Magic Mountain Corp.*, —— F. Supp.——, Docket No. 68 Civ. 395, SDNY. Opinion of McClean, J. dtd. Sept. 25, 1968, Appendix p. 1a; Seigel, 7B McKinney's CPLR, § 5201, Cum. Supp. 1968-69, p. 15 et seq.

[2] Anything attached, of course, really belongs to the insurer (Hanover). The duty to defend is the insurer's right under the conditions of the policy, a right to defend the insurer's treasury against untoward claims.

with respect to defense is a further instance of the interference by New York in a foreign contract of insurance which is in addition to the interference depriving the insurer of its rights under the policy's "No Action" clause. Such interferences with the rights of the insurer under this foreign policy of insurance violate constitutional rights of due process, as discussed in Appellant's Jurisdictional Statement, p. 10.

2. The Second *Simpson* Decision Does Not Relieve the Insured of the Danger of *in personam* Liability if It Defends on the Merits in New York.

As noted above, it has been assumed that the second *Simpson* decision, 21 N.Y.2d 990, removes the possibility that the judgment of the New York court will be used *in personam* against the insured in a second action in another jurisdiction (e.g. Maryland) to recover amounts in excess of the policy limits. It is submitted, however, that this assumption is incorrect.

In the second *Simpson* decision the New York Court of Appeals said that ". . . there may not be any *recovery against the defendant* in this sort of case *in an amount greater than the face value of such insurance policy* even though he proceeds with the defense on the merits. Consideration of CPLR 320(c) and its effect generally must, of course, await future cases." (Emphasis added) 21 N.Y.2d at p. 991.

The Court of Appeals by this decision did not judicially repeal CPLR 320(c), which requires the defendant to submit to *in personam* jurisdiction in order to defend on the merits. It is, therefore, as likely that the intent of the Court was to retain CPLR 320(c) and consider the defendant personally before the Court, but restrict the amount of any recovery against the defendant to the policy limits. If

this is so, then the dilemma which caused Judge Croake to declare the attachment unconstitutional in *Podolsky* v. *Devinney*, 281 F. Supp. 488 (1968), still exists. Any New York judgment will be *res judicata*, at least on the question of liability, in the second action.

3. The Second *Simpson* Decision Does Not Remove the Constitutional Problems With Respect to the Rights of the Insurer.

In the *Simpson* case, *supra*, the moving party was the insured defendant. The insurer did not appear. Therefore, in the second *Simpson* decision on rehearing the New York Court of Appeals did not consider the rights of the insurer. In the present case the moving party is the insurer, Hanover, and it is its rights which must be considered.

Substantial due process questions with respect to the insurer are presented. The first is whether the action of the State of New York in nullifying the "No Action" clause and otherwise changing the terms of the foreign insurance policy violate due process under the rationale of *Home Insurance Co.* v. *Dick*, 281 U.S. 397 (1930). The second question is whether New York can constitutionally allow a direct action against an insurer in the present circumstances under *Watson* v. *Employers Liability Insurance Co.*, 348 U.S. 66 (1954). Finally, the expansion of constitutional *in personam* jurisdiction under the "long arm" statutes necessitates an examination of *in rem* jurisdiction and an evaluation as to whether such jurisdiction violates ". . . traditional notions of fair play and substantial justice . . ." *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945). These substantial federal questions are discussed at length in the dissent of Burke, J. in the original *Simpson* decision 21 N.Y. 2d at 317. Cases subsequent to the second *Simpson* decision recognize that these con-

stitutional questions still exist with respect to the insurer's rights. See, e.g. *Jarvik* v. *Magic Mountain Corp.*, —— F. Supp. —— (SDNY, 1968) (App. pp. 2a, 3a).

CONCLUSION

The constitutional questions arising from the attachment in New York of liability insurers' duties in order to obtain jurisdiction over non-residents are novel and are the subject of many suits pending in New York and Federal courts, both trial and appellate. (At present at least one case, *Minichiello* v. *Rosenberg,* Docket No. 32534, has been argued and is awaiting decision in the U. S. Court of Appeals, 2nd Circuit.) Until these constitutional questions are fully considered by this Court enormous amounts of legal and judicial expense will be incurred in dealing with these cases and litigants will be forced to take actions which may be irrevocably prejudicial while their rights remain uncertain. It is respectfully submitted that the subject appeal fairly presents substantial federal questions which are ripe for full consideration by this Court and that such full consideration by the Court is necessary to avoid further harm to appellants and other litigants in the New York attachment suits.

For the foregoing reasons, it is respectfully urged that the petition for rehearing be granted and that jurisdiction be noted.

FLORINDO M. DEROSA
DUNCAN C. LEE
FRANK A. CELENTANO
Counsel for Appellant

PETER J. MALLOY, JR.
Of Counsel

Certificate of Counsel

I, Peter J. Malloy, Jr., one of the counsel for the above-named appellant, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

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Counsel for Appellant